Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Reclassification of License of	)	RM-10567
Station KJEL(FM)	)	
(Lebanon, Missouri)	)	
	)	
In re Application of	)	
	)	
OZARK BROADCASTING, INC.	)	File No. BPH-20030401ABZ
KJEL(FM), Lebanon, Missouri	)	
	)	
For Minor Change	)	
	)	

TO: Full Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Ozark Broadcasting, Inc. ("Ozark"), by its attorney, hereby respectfully opposes the Petition for Reconsideration, filed in this proceeding under date of August 29, 2003, by Four Him Enterprises, L.L.C. ("Four Him"). In opposition thereto, it is alleged:

1. The facts in this case are not in any significant dispute. All parties agree that on September 20, 2002, the FCC released an Order to Show Cause, looking towards the downgrading of Ozark's FM station at Lebanon, Missouri, KJEL, from Class C status to Class C0 status. Nobody disputes that on September 20, 2002, the Commission released a Public Notice, reporting the Order to Show Cause. It is also undisputed that, while the Order to Show Cause indicated that it was being sent to Ozark by Certified Mail - Return Receipt Requested, the Commission has no written receipt and Ozark has denied ever receiving a copy of the Order. Thus, the issue is a very simple one:

Whether Ozark was entitled to actual notice of the issuance of the Order or whether it was entitled only to constructive notice? Four Him argues that constructive notice was sufficient. We respectfully disagree for the reasons set forth below.

2. Many, many years ago, the Court of Appeals of the District of Columbia was required to determine whether a license could be modified without actual notice to the licensee. The predecessor to the FCC, the Federal Radio Commission, had granted an application for a modification of the license of Station KFH, Wichita, Kansas, and terminated the existing license of a share time station owned by Unity School of Christianity. Evidently, the FRC's actions were taken after the KFH licensee filed exceptions to an examiner's report favorable to WOQ. KFH claimed to have mailed a copy of its exceptions to Unity, but the record failed to show that it was received. The Court reversed the FRC, declaring that the WOQ licensee was entitled to actual notice of the KFH exceptions as a matter of Constitutional law, *i.e.*, that without actual notice and an opportunity to be heard, there would be a denial of the due process required by the Fifth Amendment. *Unity School of Christianity v. FRC*, 64 F.2d 550 at p. 552 (1933).

3. Commenting on the issue of actual notice versus constructive notice, the Court had the following to say:

> "The rules of the Commission require an Examiner who has taken testimony to have it transcribed and reported back to the Commission, together with a written report containing recommendations as to the decision to be made and the facts and grounds upon which the recommendations are based. That was done in the present case. The exceptions filed to that report by KFH were accompanied by the affidavit of a clerk in the office of its counsel (as required by the rules of the Commission) that she had mailed a copy of such exceptions 'to each of the parties participating in the hearing' before the Examiner. When counsel for the parties are located in the same city we think it better practice to attempt to serve opposite counsel, and, in the event

mailing is necessary, that notice be sent by registered mail." 64 F.2d 550 at p. 551.

Admittedly, *Unity* is a very old case. However, the Constitution has not changed. If a licensee was entitled to actual notice before its license could be modified in 1933, it is entitled to actual notice in 2003.

4. Most of the cases cited by Four Him deal with completely different statutes and have no relevance to Section 316 of the Act, the section that requires the Commission to give written notice before modifying a license. *Forus FM Broadcasting of New York, Inc.*, 7 FCC Rcd 7880 (1992), for example, dealt with the right of an existing station to file a petition to deny directed against a grant of an FM booster. Petitions to deny are governed by Section 309 of the Communications Act, which does not require written notice to anybody. To the same effect, *In re Application of Selma Television, Inc. (WSLA-TV), Selma, Ala. For a Construction Permit*, 29 FCC 2d 522 (1971). *Black Hills Broadcasting, L.L.C.*, 14 FCC Rcd 16146 (1999), was a case involving a party who already had an application on file and missed the deadline to participate in Auction No. 25; clearly, parties who already have applications on file have a duty to look for public notices which impact their applications. Here, Ozark did not have any application on file. *National Black Media Coalition v. FCC*, 760 F.2d 1297 (D.C. Cir. 1985), was a case in which there was a dispute as to whether a party to a proceeding had received actual notice or not. The Commission said that it had sent the notice. The appellant claimed that it did not get the notice but, as the Court of Appeals observed, it did not make any difference because the appellant failed to meet the filing deadline; the filing deadline is statutory and cannot be waived.

5. There are at least two recent FCC cases which do, in fact, refer to the type of

notice required in Section 316 cases. These cases are: *Denison-Sherman, Texas, et al.*, 12 FCC Rcd 10265 (Policy and Rules Div. 1997); and *Spring Valley, Minnesota and Osage, Iowa*, 12 FCC Rcd 15237 (All. Br. 1997). In each of these cases, the Commission issued a show cause order, looking towards the modification of a station license. In each case, a copy of the order was sent to the target licensee by certified mail. In each case, the licensee apparently did not receive the order, because no certified mail receipt could be found. In each case the target licensee learned of the existence of the order and filed a timely response. Therefore, since each licensee had received actual notice, the Allocations Branch found that in each instance the failure of the licensee to receive the certified mail was "harmless error". *Spring Valley* at ftnt. 3; *Denison-Sherman* at para. 6. Thus, the Allocations Branch conceded that there was an "error", but indicated that it was "harmless", because in each instance the target licensee had received actual notice. Here, of course, Ozark did not receive actual notice. Therefore, the error in this case was not harmless.

6. Four Him claims that in order to file a response to the Show Cause Order after the date specified in that Order Ozark is required to demonstrate that its response will not prejudice the rights of other parties. This is just the backhanded way of arguing that Four Him has been prejudiced by the late-filed response. In fact, Four Him suffered no prejudice. Prejudice, as defined by the courts, is prejudice to somebody's "substantive rights". *Purnell v. City of Akron*, 925 F.2d 941, 951 (6th Cir. 1991); *U.S. v. Wise*, 221 F.3d 140, 153 (5th Cir. 2000). To be prejudiced, therefore, Four Him must have substantive rights. In this instance, Four Him had a right under Section 1.420 of the Commission's Rules to the issuance of a show cause order. The order was, in fact, issued. Therefore, Four Him received what it was entitled to receive.

7. Four Him, however, was not entitled to a modification of the KJEL license. For

the license to be modified, the Commission must proceed in accordance with the requirements of the statute. Clearly, the statute requires actual notice. Otherwise, the FCC would not spend taxpayer money sending out orders to show cause by certified mail, as it always does.

8. All of this makes common sense. In the case of pre-grant petitions to deny, the FCC has no way of knowing who might wish to file one. Thus, it would make no sense to require the FCC to give actual notice to prospective petitioners, and Congress has decided, instead, to simply require the FCC to give constructive notice in its public notices. 47 U.S.C. Section 309(d). Similarly, when the Commission auctions spectrum it cannot possibly be expected to write to everybody in the entire country and send them a notice of the auction procedures. It is sufficient to simply adopt rules of general applicability and publish those rules. See, *Black Hills Broadcasting*, cited supra. But where, as here, the FCC knows that it is targeting a single license for modification, it makes sense that the licensee be given actual notice; the statute clearly requires actual notice; but Ozark did not get the actual notice to which it was entitled.

Respectfully submitted,

September 9, 2003

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 9th day of September, 2003, to the offices of the following:

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